

Supreme Court, U.S.

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NO. 89-1759

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

A.L. Lockhart, Director,
Arkansas Department of Correction

Petitioner

vs.

William Lloyd Hill

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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47 PM

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STATEMENT OF THE CASE

On June 30, 1981, Respondent William Lloyd Hill, a prisoner in the Arkansas Department of Correction, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Arkansas, Western Division. Respondent attacked the voluntariness of his guilty plea entered in the Pulaski County Circuit Court in 1979. The State of Arkansas had charged Respondent with first degree murder and theft of property. A negotiated plea entered into by Respondent resulted in a sentence of 35 years imprisonment for first degree murder with a 10-year concurrent term for theft of property. In his first Petition for Writ of Habeas Corpus, Mr. Hill alleged that his attorney informed him prior to pleading that he would only have 6 years to serve on his sentence if he "stayed out of trouble." In his first Petition, Mr. Hill alleged that his attorney failed to inform him of the ramifications of Ark. Stat. Ann. §43-2828(2) and §43-2829(3), known as Act 93, now recodified as A.C.A. §19-93-602,603. These sections govern potential parole eligibility and extend lengthier terms for second offenders. As a result of a previous felony conviction, Mr. Hill was a second offender under the Act. As a second offender, Mr. Hill was not eligible for parole consideration until having served one-half of his term less good time or approximately 9 years.

The United States District Court entered an Order on the first Petition on March 2, 1983, denying the Respondent's request for an evidentiary hearing. Mr. Hill appealed to the United States Court of Appeals for the Eighth Circuit asserting that he was entitled to an evidentiary hearing in regard to the voluntariness of his plea and the competency of his court-appointed attorney. The three-judge panel of the Eighth Circuit by a two to one vote affirmed the decision of the United States District Court. Hill v. Lockhart, 731 F.2d 568 (8th Cir. 1984). Mr. Hill petitioned for rehearing en banc. Rehearing en banc was granted. On September 20, 1984, by a five-five split vote the Eighth Circuit Court of Appeals affirmed the dismissal by the United States District Court. Hill v. Lockhart, 764 F.2d 1279 (8th Cir. 1985).

Mr. Hill petitioned for Writ of Certiorari to the United States Supreme Court and certiorari was granted on March 18, 1985. The decision of the United States Supreme Court was rendered on November 18, 1985, in Hill v. Lockhart, 474 U.S. 52 (1985). The Court affirmed the judgment of the Court of Appeals but as a result of a pleading defect in Hill's original pro se Petition. Specifically, the United States Supreme Court found that Mr. Hill failed to allege that he would not have entered the plea but for the incompetent advice of counsel.

The concurring opinion noted that Mr. Hill had stated in his objections to the magistrate's recommended findings of fact and conclusions of law that he would not have entered the plea except for counsel's erroneous advice. Hill v. Lockhart, 474 U.S. at 63. Mr. Justice White and Mr. Justice Stephens further stated that if Hill proved these allegations at a habeas hearing he would be entitled to relief. Hill v. Lockhart, 474 U.S. at 63. On January 15, 1986, Mr. Hill filed his second Petition for Writ of Habeas Corpus curing the pleading defect in his first Petition and raising once again the allegations that his plea was involuntary and that he was denied the effective assistance of counsel.

Lockhart moved to dismiss the second Petition arguing that it constituted an improper successive petition. The district court denied the Motion to Dismiss finding that the interests of justice would best be served by addressing the issues again. An evidentiary hearing was conducted before a magistrate on May 22, 1987. The magistrate filed Recommended Findings of Fact and Conclusions of Law to the effect that the district court was bound by the previous position of the Eighth Circuit. The district court returned the case to the magistrate for additional findings concluding that the magistrate was not barred from making factual findings under the Eighth Circuit's decision since the first petition was decided by the Eighth Circuit before

the Supreme Court applied Strickland v. Washington, 766 U.S. 668 (1984), to guilty pleas. The Amended Recommended Findings of Fact and Conclusions of Law by the magistrate were adopted by the United States District Court on July 29, 1988. (Pet. App. C-2) Those Findings of Fact and Conclusions of Law granted habeas relief to Mr. Hill finding that Hill's court appointed counsel incorrectly advised him as to his earliest potential parole eligibility date. This misadvice was found to be below the objective standard of reasonableness required by attorneys representing criminal defendants. The court also found that Mr. Hill would not have pleaded guilty but for the erroneous parole advice from his attorney, and that he was prejudiced in so doing because of the drastic difference between what he was led to expect and the reality of his parole possibilities. (Pet. App. D)

A divided panel of the Eighth Circuit affirmed. Lockhart v. Hill, 877 F.2d 697 (8th Cir. 1989). Lockhart's Petition for Rehearing En Banc was granted. The district court was affirmed by a five to four vote. Lockhart v. Hill, 894 F.2d 1009 (8th Cir. 1990).

SUMMARY OF ARGUMENT

Respondent argues to this Court that the Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied in that the circuits are not in conflict on the issue presented and Petitioner cites no state cases which the Eighth Circuit decision is in conflict with. Further, the Eighth Circuit correctly held that where a defendant relies on the erroneous advice of his attorney as to his earliest potential parole eligibility date in a negotiated plea to a sentence of 35 years and waives his right to trial by jury based on that advice, he has received ineffective representation of counsel when he would have gone to trial had his counsel accurately advised him. The Eighth Circuit correctly applied Strickland v. Washington, 466 U.S. 668 (1984), and Lockhart v. Hill, 474 U.S. 52 (1985), in affirming the district court in granting Mr. Hill's habeas petition.

REASONS FOR DENYING THE WRIT

The factual events forming the basis of Hill's habeas corpus petition were succinctly set forth by the Eighth Circuit as follows.

Hill was charged with first degree murder and theft of property occurring on October 1, 1978. He pleaded guilty in the Circuit Court of Pulaski County, Arkansas, on April 6, 1979, explaining to the court that he and Darrell Pitts had been to a bar and "Pitts had hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him." Hill said he shot Pitts and fled the state with Pitts' car and gun. The court accepted Hill's plea and sentenced him to concurrent sentences of 35 years for the murder and 10 years for the theft.

Prior to his plea hearing, Hill had asked his appointed counsel about his potential sentence and parole eligibility under Arkansas law. His attorney told him that he faced a sentence of 5 to 50 or life, and that he could be eligible for parole after serving one-third of the sentence with time off for good behavior. In fact, Ark. Stat. Ann. §43-2828, §43-2829 (1977), known as "Act 93," required individuals with prior convictions to complete not one-third but one-half of their sentence with time off for good behavior. Mr. Hill, who had been convicted of burglary in Florida in 1978, apprised his counsel of that prior conviction at the outset of their first meeting, but his counsel never mentioned Act 93 or its effect on Hill's parole eligibility. (During plea negotiations, Hill rejected a proposal by the prosecution for a 45-year prison term in exchange for a guilty plea because his lawyer told him that with such a sentence he would be eligible for parole in "about 9 years. And I

² Ark. Stat. Ann. §46-120 (Repl. 1977) provided that an inmate's good behavior can produce a sentence reduction of 30 days for every 30 days actually served.

³ These statutes have been recodified as A.C.A. §16-93-602, 603, and 604 (1987).

told him that I couldn't see how that would be in my benefit to take that sentence because it was my understanding that people were getting out from life sentences [as a result of executive clemency] after only serving 7 years, and he said that was true." Hill testified that he understood commutations of life sentences to be fairly commonplace though not guaranteed.⁴ Using 7 years as his bench mark Hill then accepted the prosecution's subsequent offer of a 35-year sentence in exchange for his plea of guilty, since his counsel had told him that his parole eligibility would then be 6 years, and had advised him to accept that offer. Presumably, counsel calculated as follows: one-third of a 35-year term is approximately 12 years and with optimal behavior Hill could be out in six years. However, as a second offender Hill actually must serve one-half of the 35-year term (approximately 18 years), so that with the maximum time off for good behavior, his earliest parole eligibility is slightly less than nine years, the very term he had rejected when he turned down the 45-year bargain first offered him.

4 At the time this was a correct perception, or at least one widely shared by the bar. Commutations of life sentences have become less frequent in recent years.

Hill v. Lockhart, 877 F.2d 698, 699-700 (1989).

The Eighth Circuit concluded that the district court's findings that there was a reasonable probability that Hill would have insisted on going to trial had he received correct advise regarding parole eligibility was not clearly erroneous. The majority opinion in the Eighth Circuit stated, "Given the attorney's knowledge of his client's particular concern, a failure to check the applicable law was especially incompatible with the objective standard of reasonable representation in Strickland." Hill v. Lockhart,

877 F.2d at 703. The Eighth Circuit noted that all the attorney needed to do was to consult the Arkansas statutes which impose no special research challenge. Hill v. Lockhart, 877 F.2d at 703. Those findings satisfied the requirements of Strickland v. Washington, 466 U.S. 668 (1984), which was applied to guilty pleas in Hill v. Lockhart, 474 U.S. 52 (1985).

The relevant findings of fact of the district court were as follows:

1. Mr. Patterson (his attorney) inquired about petitioner's prior felony convictions and was told that petitioner had been previously convicted of burglary in the State of Florida on March 1, 1978.
2. Under Arkansas statutes in effect on October 1, 1978, when the crimes were committed, the penalty for first degree murder was a term of imprisonment ranging from 5 to 50 years or life.
3. During plea negotiations the prosecuting attorney offered petitioner a prison term of 45 years in exchange for a guilty plea.
4. The prosecutor later offered petitioner concurrent sentences of 35 years and 10 years for guilty pleas to his murder and theft charges respectively. Petitioner accepted this offer upon the advice of his attorney.
5. In the process of deciding whether to accept the plea offer, the petitioner asked his attorney when he would be eligible for parole. The attorney told him that he would be eligible for parole within six years with good behavior.
6. Petitioner testified that he rejected the 45-year offer because the attorney told him that it would take nine years to become parole eligible under a 45-year sentence.
7. The legal parameters of parole eligibility were a fundamental component in petitioner's decision making process concerning whether to accept or reject an offer of a particular term of years in prison in

exchange for a negotiated plea of guilty to the criminal charges.

8. Petitioner testified that he would have gone to trial rather than voluntarily accept any sentence from which he could not under optimum conditions and his best behavior have achieved parole eligibility in less than seven years. Petitioner entered the guilty plea because his attorney advised him that he could achieve parole eligibility under a 35-year sentence in six years with good behavior.

9. The attorney's advice was incorrect.

(Pet. App. D-3,4)

Lockhart argues that the Eighth Circuit erred in finding that the district court was not clearly erroneous in concluding that it was reasonably probable that Hill would have insisted on going to trial when balanced against a possible 50-year or life sentence that could have resulted. Lockhart assumes that the logical outcome at trial would have been a lengthier sentence than the 35 years bargained for. There is no basis in the record for this assumption. Lockhart ignores the possibility that Mr. Hill could have received a sentence of as little as five years on first degree murder or he could have been acquitted. Hill's remarks at his sentencing that the deceased "hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him." suggests that the defense of self-defense might have been available and that lesser included offense instructions of second degree murder or manslaughter could have been given. The State's assertion that it is not reasonably probable that Hill would

have rejected the 35-year offer had he known his true parole eligibility date of nine years because of the likelihood of a lengthier sentence at trial is totally conjectural. There is no evidence in the record reflecting the strength or weakness of the State's case.

However, the conclusion that it is reasonably probable that Hill would have rejected the 35-year offer had he known his true earliest potential parole eligibility date is supported in the record. Hill had rejected a previous plea offer of 45 years according to counsel's also erroneous advice that he would have been potentially parole eligible at nine years. (Res. App. 17-18) Therefore, it is not logical to conclude then that he would have accepted a 35-year offer had he correctly known his earliest potential parole eligibility date of nine years. In adopting the Amended Recommended Findings of Fact and Conclusions of Law from the magistrate, United States District Court Judge G. Thomas Eisele noted: "The magistrate was obviously impressed with the fact that the defendant turned down a proposed term of 45 years before accepting what amounted to a term of 35 years." (Pet. App., C-3)

Hill's reasoning in rejecting the 9-year potential parole eligibility date on a 45-year sentence rested upon the belief that even on a life sentence he might only serve seven years. Hill testified that he told his attorney that he didn't see how the 9-year offer would be in his best

benefit because of his understanding that people were getting out from life sentences after serving only seven years. (Res. App. 18) Hill further testified that his attorney confirmed that information. (Res. App. 18) The reasonableness of this widespread belief that individuals were being released from prison on a life sentence after serving seven years during that era was noticed in the majority panel decision of the Eighth Circuit. Hill v. Lockhart, 877 F.2d at 700, n.4. Therefore, the only evidence in the record from which the court could determine the reasonableness of Mr. Hill's decision supports the conclusion that it is reasonably probable that he would have gone to trial had he known his true parole eligibility date.

The narrow holding in Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990)(en banc), is that where counsel acts incompetently in advising a defendant as to his earliest potential parole eligibility date and relying on that misadvice the defendant pleads guilty where he would have gone to trial, the defendant has been denied effective assistance of counsel. (The case does not suggest nor did Mr. Hill argue that there is any affirmative duty on behalf of the judge taking the plea to advise the defendant concerning parole.)

In asking this Court to grant certiorari, Lockhart states that the Eighth Circuit has taken a position which conflicts with the decisions of other federal and state

courts. The three federal cases cited by Lockhart supporting the asserted conflict within the circuits are Cepulonis v. Ponte, 699 F.2d 573 (1st Cir. 1983); Hunter v. Fogg, 616 F.2d 55 (2d Cir. 1980); and, Trujillo v. United States, 377 F.2d 266 (5th Cir. 1967). However, a review of these three cases results in the conclusion that the holding of the Eighth Circuit in this case is not in conflict with any of them.

The First Circuit case cited by Lockhart is Cepulonis v. Ponte, supra. In that case counsel misinformed his client as to his parole eligibility date; however, the First Circuit affirmed the district court which had made the factual finding that the advice concerning parole eligibility was not a "key" factor in Cepulonis' decision to plead guilty. The First Circuit reasoned,

Although misinformation may be more vulnerable to constitutional challenge than mere lack of information, see, e.g., Strader v. Garrison, 611 F.2d 61, 63-64 (4th Cir. 1979), a defendant seeking to set aside a guilty plea must at the very least show that correct information would have made a difference in his decision to plead guilty. (Citations omitted.)

Therefore, the Eighth Circuit is not in conflict with the First Circuit in that in Cepulonis' deliberations to plead guilty, as opposed to Mr. Hill's, his potential parole eligibility date was not found to be a "key" factor by the district court.

The Fifth Circuit case cited by Lockhart is Trujillo v. United States, supra. In this 1967 case the Fifth

Circuit took the position that a defendant was not entitled to be informed by the court upon his sentencing for narcotics violations after pleas of guilty were entered of his ineligibility for parole. This case deals with an interpretation of Rule 11 of the Federal Rules of Criminal Procedure and deals with what a federal judge must inquire about to determine whether or not a federal court guilty plea is voluntary. The issue in Cepulonis was framed as "whether ineligibility for parole is a consequence of the plea about which a defendant must be informed." Trujillo v. United States, supra at 268. In interpreting Rule 11, the Fifth Circuit held,

We, therefore, conclude that the judge was not required to inform appellant of ineligibility for parole upon conviction of the offense charged in Count Three.

Trujillo v. United States, supra at 269. The Eighth Circuit opinion at issue in Hill v. Lockhart does not address the issue of whether or not a judge should discuss parole eligibility with a defendant when taking his plea or sentencing him. Hill v. Lockhart addresses only misadvice of counsel concerning parole eligibility relied upon by a defendant in making his decision to plead guilty and the right to effective assistance of counsel under the Sixth Amendment. Therefore, the Eighth Circuit and the Fifth Circuit are not in conflict.

Lockhart's third case is Hunter v. Fogg, supra, a Second Circuit case. In Hunter v. Fogg, supra, the

defendant received a 10-year sentence. Under New York's parole laws, the parole board and not the court set a minimum period of imprisonment that the defendant had to serve before parole would even be considered. The parole board had the discretion to set the minimum period of imprisonment at any point in time determined appropriate provided the period would not be less than one year. Hunter v. Fogg, supra at 62, n.13. Further, once a date was set, before that date was reached, the parole board could reconsider and reduce the minimum period of imprisonment so long as that period did not drop below one year. Hunter v. Fogg, supra at 62, n.13. The district court found that Hunter's attorney had misinformed Hunter prior to his guilty plea and advised him that the minimum period of imprisonment would be no greater than one-third of the maximum 10-year sentence. The attorney's affidavit which was attached to the habeas petition stated that he told Hunter that "he might anticipate a period of one-third of a 10-year sentence." The attorney told Hunter that a minimum eligibility date in excess of one-third of the maximum term was "unlikely." The Second Circuit disagreed with the district court and found that that statement implied that a minimum period of imprisonment greater than one-third of the sentence was a distinct possibility. The Second Circuit concluded that the attorney's conversation with Hunter provided no basis for concluding that the attorney did more

than give his client a prediction "couched in the language of hope, and not promise." Hunter v. Fogg, supra, at 62. The attorney did, however, correctly advise his client as to the earliest potential parole eligibility date under the then existing New York law. Hunter v. Fogg, supra at 62, n.13, n.15. The court went on to reason that even if the attorney had assured Hunter that at some point within the first one-third of his sentence he would have had an opportunity for parole release, he in fact received that opportunity. The parole board met 11 months after Hunter was sentenced to consider what minimum period of imprisonment to select and the board had complete discretion as set forth above. In Mr. Hill's case, the misadvice of the attorney was couched in positive terms. Hill was positively advised of his earliest potential parole eligibility date which was statutory and ascertainable and positively advised incorrectly.

The position taken by the Eighth Circuit in Lockhart v. Hill is not in conflict with the First, Second, and Fifth Circuit cases cited by Lockhart. Lockhart does not cite any state court cases to support his assertion that the Eighth Circuit decision is in conflict with state court decisions.

The importance of advice concerning the earliest potential parole eligibility date was termed "normally one of the most important factors to a criminal client" by

Hill's expert witness, the past president of the Arkansas Association of Criminal Defense Lawyers. (Res. App. 4) That evidence was uncontradicted. The respondent asserts that the question at issue here has been settled by this Court in its decisions in Strickland v. Washington, supra, and Hill v. Lockhart, supra. In applying the two-pronged test for ineffectiveness of counsel to guilty pleas set forth in Strickland v. Washington to this narrow question, the record clearly supports the conclusion reached by the district court and a majority of the United States Court of Appeals for the Eighth Circuit. The record in this case supports no other conclusion than the fact that there was a reasonable probability that Hill would not have entered the plea but for counsel's misadvice concerning his earliest potential parole eligibility date. The importance of such advice termed "one of the most important factors to a criminal client" is unchallenged. It is important because it is a central issue in plea bargaining.

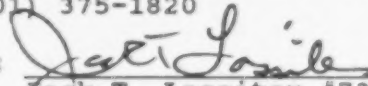
CONCLUSION

For the reasons set forth above Lockhart's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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By:


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CERTIFICATE OF SERVICE

I hereby certify that I did on the 31 day of May, 1990, mail a true and correct copy of the above and foregoing to the following by placing a copy of same in the United States Mail, with sufficient postage thereon to insure delivery:

Jack Gillian, Esq.
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200 Tower Building
4th & Center Streets
Little Rock, AR 72201


Jack T. Lassiter

1 MR. LASSITER: Correct.

2 THE COURT: And 23 --

3 MR. LASSITER: Pardon me. 43.

4 THE COURT: 43. All right.

5 MR. LASSITER: 2829 (3).

6 THE COURT: All right. Very well.

7 MR. LASSITER: We are ready to call our first
8 witness.

9 THE COURT: Please do so.

10 MR. LASSITER: Dick Moore.

11 RICHARD N. MOORE, JR., PETITIONER'S WITNESS, SWORN.

12 DIRECT EXAMINATION

13 BY MR. LASSITER:

14 Q State your name, please.

15 A Richard N. Moore, Jr.

16 Q And what is your occupation, Mr. Moore?

17 A I'm a lawyer.

18 Q And where do you practice?

19 A I practice in Little Rock, Arkansas.

20 Q How long have you been in Little Rock since law school?

21 A I've been practicing since 1974 in Little Rock.

22 Q When were you licensed as an attorney?

23 A August 1974.

24 Q And where did you go to law school?

25 A University of Arkansas School of Law at Fayetteville.

- 1 Q And you graduated from there in 1974?
- 2 A Yes, sir.
- 3 Q Where did you do your undergraduate work?
- 4 A University of Arkansas at Fayetteville.
- 5 Q What was your degree in there?
- 6 A Marketing.
- 7 Q Did you graduate in '70?
- 8 A '71, I believe.
- 9 Q All right. Now when you returned to Little Rock after law
10 school, what was the first job you had as an attorney?
- 11 A I was the Deputy Prosecuting Attorney for three years.
- 12 Q And during that time as the Deputy Prosecuting Attorney,
13 were you daily involved with the practice of criminal law?
- 14 A Yes, sir.
- 15 Q And did you try cases?
- 16 A Hundreds.
- 17 Q And did you negotiate pleas?
- 18 A Hundreds.
- 19 Q All right. After you left the Prosecuting Attorney's
20 Office, did you go into private practice?
- 21 A Yes, sir, in 1977.
- 22 Q And have you continuously been in private practice since
23 that time?
- 24 A Yes, sir.
- 25 Q Here in Little Rock?

1 A Yes, sir.

2 Q And with what firm?

3 A Dodds, Kidd, Ryan and Moore.

4 Q During the period of time you've been in private practice,
5 has a large portion of your practice been devoted to criminal
6 defense work?

7 A Yes, sir, probably in excess of 50 percent.

8 Q Would that still be true in 1987?

9 A Yes, sir.

10 Q And in the course of your private practice, have you
11 defended folks in jury trials?

12 A Numerous times.

13 Q And in non-jury trials?

14 A Yes, sir.

15 Q And have you negotiated pleas in Federal and State court?

16 A Yes, sir.

17 MR. LASSITER: Your Honor, I will submit that Mr.
18 Moore can be qualified as an expert in the field of criminal
19 law as an attorney qualified to render an opinion as to the
20 customary skill and diligence that a reasonably competent
21 attorney would exercise in representing a client who has been
22 criminally charged.

23 THE COURT: The Court so declares.

24 BY MR. LASSITER:

25 Q Mr. Moore, are you familiar with what is commonly called

1 Act 93?

2 A Yes, sir.

3 Q And would you just briefly describe what that means to
4 you?

5 A Act 93 is the provision that sets out parole eligibility
6 for different offenders depending upon their classifications,
7 whether or not they'll have to serve a certain percentage of
8 their sentence.

9 Q Would a reasonably competent attorney practicing criminal
10 law be familiar with that, do you think?

11 A Yes, sir.

12 Q All right. During the course of your private practice
13 when you have discussed plea negotiations with clients, have
14 they ever inquired of you concerning when their earliest
15 potential parole eligibility date might be?

16 A Almost every criminal client has.

17 Q All right. And is that usually an important factor to
18 them?

19 A It's normally one of the most important factors to a
20 criminal client.

21 Q All right. And if you were representing someone that
22 let's say asked you what their earliest potential parole
23 eligibility date would be, what information would you need in
24 order to advise them accurately?

25 A You would have to know what type of sentence you're

1 negotiating for, what the outside bounds are, say ten years to
2 serve. You'd want to know what their background, if they've
3 been convicted before; if they had been convicted, had they
4 actually gone down to the prison and served any time, actually
5 been committed to a unit. I think basically those provisions
6 are what you're going to have to throw in the pot to figure
7 out just a guideline for your client.

8 Q When you are negotiating a plea, do you inquire of your
9 client as to whether or not he has any prior convictions?

10 A Yes, sir.

11 Q And would a reasonably competent attorney so inquire?

12 A Yes, sir.

13 Q And if a client were to ask you when his earliest
14 potential parole eligibility date would be, would you consider
15 that inquiry as to whether or not he's had past convictions to
16 be part of your duty owed to him as an attorney representing
17 him?

18 A Yes.

19 Q All right. If an attorney advising his client as to his
20 earliest potential parole eligibility date were to misadvise
21 him because he did not inquire as to past convictions, do you
22 think that that would be a breach of the duty owed to his
23 client?

24 A I think if you're a criminal defense lawyer and you
25 negotiate pleas that you definitely have to know and inquire

1 from your client if they have any prior convictions.

2 Q And would it be a failure to exercise the skill and
3 diligence that --

4 A Yes.

5 Q -- ought to be exercised if you do not?

6 A Yes, sir, it would be in my opinion.

7 Q All right.

8 MR. LASSITER: May I approach the witness, Your
9 Honor?

10 THE COURT: Yes, you may.

11 BY MR. LASSITER:

12 Q Mr. Moore, let me show you what has been introduced here
13 as Joint Exhibit Number 1, and can you tell me what that is?

14 A It appears to be a copy of what is a fairly standard form
15 used in the Pulaski County criminal courts, a plea statement.
16 This one appears to have the signature of Mr. William L. Hill
17 and the signature of who apparently was his attorney on April
18 6th of '79, Mr. William Patterson, docket number 78-1922.

19 Q All right. The statement reads in the first paragraph
20 that "You are charged with first-degree murder and theft of
21 property in the Pulaski County Circuit Court. It is
22 necessary that you fully understand the entire
23 contents of this document.

24 You are charged with a felony and with zero prior
25 convictions."

1 Now would you explain to the Court what that last sentence
2 I just read means?

3 A The sentence "You are charged with a felony and with zero
4 prior convictions"?

5 Q Yes.

6 A That indicates to me that if this is a negotiated plea
7 with an attorney from the Pulaski County Prosecutor's Office
8 that there is not any habitual charge that is part and parcel
9 to this particular case, 78-1922.

10 Q Is that the purpose of having that sentence in there to
11 reflect on the plea statement whether or not the defendant has
12 been charged with past crimes as part of the habitual offender
13 act?

14 A Yes, that would be the reason for it and it dovetails into
15 the next sentence that sets out what the sentence would be
16 because if they're charged with differing numbers of
17 convictions the sentence can be enhanced within certain
18 limits.

19 Q Now can you tell by looking at that whether or not Mr.
20 Hill actually did have any prior convictions? Would that be
21 meaningful for that purpose?

22 A I don't think you -- you would assume, I suppose if you're
23 not familiar with the form that he did not have any prior
24 convictions.

25 Q And based on your experience in Pulaski County, can you

1 tell anything about whether or not he did?

2 A No, I can't. All I know is he was not charged with any
3 prior convictions under case 78-1922.

4 Q While you were a Deputy Prosecuting Attorney and engaged
5 in plea negotiations, did you at times negotiate pleas with
6 criminal defendants who had a past criminal history wherein
7 you did not use the Habitual Offender Statute?

8 A Yes, sir.

9 Q And did you sometimes see plea statements like this plea
10 statement where an individual did have a past felony but it
11 did not show on the face of the plea statement?

12 A Yes, sir.

13 Q And I assume the reason is that, again, he's just not
14 charged under the Habitual Offender Act; is that correct?

15 A That would be the reason that I would understand it to be
16 on there for zero.

17 Q And since you have been in private practice here on the
18 defense side of the fence, have you seen similar plea
19 statements?

20 A Yes, sir. I've pled clients that have past convictions
21 but were not charged because we were either cooperating with
22 the Government or State, and there's usually some reason for
23 negotiating a plea and leaving out the possible additional
24 penalty prior convictions could bring with it.

25 Q And would you have filled out a similar plea statement for

1 those clients?

2 A Similar to Joint Exhibit 1?

3 Q In form, similar in form?

4 A Yes, sir. Yes, sir.

5 Q And in the blank where it says, "You are charged with
6 prior convictions," with those clients you just mentioned,
7 what would you have put in there?

8 A I'd have "zero."

9 Q All right.

10 MR. LASSITER: That's all I have, Your Honor.

11 THE COURT: Mr. Gillean.

12 CROSS EXAMINATION

13 BY MR. GILLEAN:

14 Q Mr. Moore, just a couple of questions. Did you know
15 William Patterson?

16 A Yes, sir.

17 Q Do you know whether or not he was familiar with Act 93?

18 A Of my own knowledge, if you're asking me do I know
19 specifically, I'd have to answer, no, I do not.

20 Q Okay. So you don't really know whether he advised his
21 client about Act 93 or not?

22 A I have no way of knowing that, no, sir.

23 Q All right. Would it be possible that irrespective of what
24 the plea statement itself says that the State was not aware of
25 Mr. Hill's prior conviction at the time they entered into this

1 guilty plea in this particular thing? I mean, it's certainly
2 possible that they did not know about it?

3 A Again, I have no knowledge.

4 Q Right.

5 A I assume that it might be possible.

6 Q At least it is possible that they didn't know about it?

7 A I don't know.

8 MR. GILLEAN: That's all the questions I have, Your
9 Honor.

10 THE COURT: Any redirect?

11 MR. LASSITER: No redirect, Your Honor.

12 THE COURT: May Mr. Moore be excused?

13 MR. LASSITER: Yes, Your Honor, unless the Court has
14 some questions for Mr. Moore.

15 THE COURT: You're excused with the thanks of the
16 Court, Mr. Moore.

17 THE WITNESS: Thank you, Judge.

18 (Witness excused.)

19 MR. LASSITER: William Hill.

20 WILLIAM LLOYD HILL, PETITIONER HEREIN, SWORN.

21 DIRECT EXAMINATION

22 BY MR. LASSITER:

23 Q William, state your name, please.

24 A William Lloyd Hill.

25 Q And where do you presently reside?

1 A The Diagnostic Unit of the Arkansas Department of
2 Corrections.

3 Q How long have you been there?

4 A At that Unit, about four years.

5 Q What class inmate are you?

6 A Class I-B.

7 Q Do you know when your earliest potential parole
8 eligibility date is?

9 A Yes, sir, the actual release date will be in February of
10 next year but I'll actually go up in November of this year.

11 Q Okay. Now you were charged in Arkansas in 1978 with
12 first-degree murder and theft of property; is that correct?

13 A Yes, sir, that is correct.

14 Q Were you extradited to Arkansas from another state on
15 these charges?

16 A Yes, sir, I was.

17 Q Okay. Now prior to this time had you had any other felony
18 conviction?

19 A Yes, sir, I had.

20 Q And where was that?

21 A In the State of Florida.

22 Q And what was the charge?

23 A It originated -- originally there was three charges, and
24 I'm not positive what the charges actually ended up being. It
25 was a negotiated settlement just like this time, and I got a

11-

1 year and a day from -- in prison.

2 Q Okay. Did you do that time?

3 A Yes, sir, I did.

4 Q Let me back up and get a little bit of your background.

5 Where were you born?

6 A I was born in Uniontown, Pennsylvania.

7 Q Okay. And did you live with your parents growing up?

8 A No, sir, I did not.

9 Q And when did your family break up?

10 A I was about six years old.

11 Q Where did you go then?

12 A I lived the majority of my life until I entered the Marine
13 Corps at age 17 in state institutions, foster homes and places
14 like that.

15 Q Okay. And how long were you in the Marine Corps?

16 A Approximately two years.

17 Q What did you do in the Marine Corps?

18 A I was a missile technician.

19 Q Okay. Now when these charges were filed and you were
20 extradited back to Arkansas, where were you held? Do you
21 remember?

22 A I'm unclear about what you --

23 Q What jail?

24 A In the city jail part of the time and then in the Pulaski
25 County jail.

1 Q All right. And after you got back to Arkansas, when did
2 you first see an attorney?

3 A Well, the very first time I saw an attorney was the head
4 of the public defenders who happened -- who was at the
5 courtroom at the time that I went up for my hearing once I was
6 brought back from Vermont. Okay. The first time that I saw a
7 specific attorney assigned to represent me was in the jail,
8 and I saw that attorney four times.

9 Q All right. Who did you meet with the first time at the
10 jail?

11 A It was Mr. Patterson and I believe two other attorneys.
12 I'm not positive they were attorneys, but there was two other
13 people.

14 Q Do you remember what Mr. Patterson told you concerning
15 your case at the time?

16 A Well, at that time we primarily discussed -- he wanted to
17 know did I have any defense witnesses that I would like to
18 have called and things like that. And I told him that Mr.
19 Brown would be a good witness and that there were several
20 people who were -- had direct knowledge of my having been
21 attacked with the handgun that was used in the felony, and
22 that it would be in my benefit if he could find those people
23 from the bar.

24 Q Did he have a copy of the State's file with him the first
25 time he visited with you? Do you recall?

1 A I'm really not positive. And if forced to give an answer,
2 I'd have to say I don't think so.

3 Q Well, if -- yeah, if you're not positive that's all right.

4 Did he inquire as to whether or not you had any past
5 convictions?

6 A Yes, sir, that was one of the -- right immediately after
7 we first began discussing my case, that was one of the issues
8 he asked me was had I ever done any time. I told him I had.
9 I had done a year and a day in Florida, and he asked me what
10 it had been for and I explained it to him, and he didn't seem
11 to think that it was such a serious issue as far as going to
12 trial because at that time we were looking for going to trial,
13 and he said that he didn't think that the State would attempt
14 to convict me as a multiple offender because of that
15 conviction.

16 Q On his second visit what discussions did you have with
17 him?

18 A I had asked him to bring -- to see if he could get ahold
19 of the autopsy report because I thought it was important to
20 show that the deceased had been taking pills and drinking, and
21 that was the primary reason why he came back that time was to
22 discuss that.

23 Then he told me that he had not been able to find any of
24 the witnesses that I wanted.

25 MR. GILLEAN: Your Honor, I'm going to object on the

1 basis of hearsay with respect to what Mr. Patterson said, and
2 I at least make the objection for the record. Mr. Patterson,
3 of course, as has been stipulated to is not here and can't
4 offer his own version of the discussions that took place, and
5 I believe it's hearsay and it should be excluded on that
6 basis.

7 MR. LASSITER: Your Honor, I don't think we're
8 introducing this for the truth of the matter asserted. In
9 other words, it's really not important as to what witness was
10 out there or whatever, but simply to show the discussions
11 which led up to this negotiated plea which came down, and so I
12 think it comes in because we're not introducing it for the
13 truth of the matter asserted in the statements here but just
14 to show that these things were said and it led up to
15 eventually a negotiated plea.

16 THE COURT: The objection is overruled.

17 BY MR. LASSITER:

18 Q Okay. Go ahead. This is -- by the way, do you know how
19 much time passed between your first meeting and your second
20 meeting with him?

21 A Not precisely. I can give you a guess.

22 Q Well, let's not guess. During the second conversation,
23 did he have the State's file with him then? Do you know?

24 A Yes, sir, he had a very large file with him which included
25 the autopsy report.

15

1 Q Okay. At that time during these discussions in the second
2 visit, was there any mention of a plea offer from the State?

3 A We began to talk about that as an option, and the reason
4 was because none of the witnesses that I needed for my case
5 could be found. The only witness that was available was Mr.
6 Brown, and Mr. Brown's testimony was that he didn't remember
7 how he got --

8 Q Okay. Do you recall these early conversations concerning
9 the possibility of a negotiated plea with Mr. Patterson? Do
10 you recall what was specifically discussed?

11 A Yes, sir.

12 Q And tell me what was specifically discussed.

13 A I wanted to know what kind of time range I was looking at,
14 and I wanted to know if I got one of those time ranges what
15 amount of time I was looking at before I could become eligible
16 for parole, and I wanted to know what kind of a parole system
17 they had in this state. I'd only been in the state five days
18 and really didn't know that much about it other than what
19 other inmates had told me in the county jail.

20 Q Had you ever been in any kind of criminal trouble in
21 Arkansas before?

22 A No, sir.

23 Q Was this the first time you'd been here? When you say --

24 A Yes, sir.

25 Q -- "for five days," that was the first five days you'd

1 been in Arkansas before the event?

2 A Yes, sir.

3 Q All right. And what did Mr. Patterson tell you? Can you
4 recall?

5 A He told me that I was -- that the charge that I was facing
6 -- well, originally the charge that I was facing was a higher
7 one. It was dropped to first-degree murder, and he said under
8 that I would have a chance of getting from five to fifty to
9 life, and that unless they could find those witnesses that it
10 was his professional opinion that I should take -- begin to
11 seek a plea agreement with the prosecuting attorney. So
12 that's what I told him to do.

13 Q Now in your third meeting with him, did you discuss any
14 specifics concerning a negotiated plea? Had an offer been
15 made?

16 A Yes, sir.

17 Q And tell me about your third meeting?

18 A Okay. He came and told me that the state was offering 45
19 years, 35 for the murder and ten to run consecutively for auto
20 theft.

21 Q So the offer was for 45 years totally?

22 A Yes, sir, 45 altogether.

23 And I asked him how much time I would be forced to serve
24 before I became eligible for parole on that kind of a
25 sentence, and he told me about nine years. And I told him

1 that I couldn't see how that would be in my benefit to to
2 that sentence because it was my understanding that people were
3 getting out from life sentences after only serving seven
4 years, and he said that that was true.

5 Q Now let me back up to make sure the record is clear on
6 that. Your understanding about that came from where?

7 A From other inmates originally. I didn't know any --

8 Q Other inmates in the jail where you were?

9 A Yes, sir.

10 Q And you discussed that with Mr. Patterson, correct?

11 A Yes, sir.

12 Q And what was his response again?

13 A Okay. When I told him about that he said that that was
14 true, that it was, in fact, at that time not unheard of for
15 people to get out in a seven-year period of time.

16 He also said, though, that we were talking about clemency
17 versus just straight parole, and I told him that I still
18 didn't see as how that made any difference. I wanted -- if I
19 was going to have to do nine years to become eligible for
20 parole, then I might as well take the chance on a jury trial.
21 And he said that he was going to go back and talk to the State
22 and see if he could get a different offer.

23 Q And did he get a different offer?

24 A Yes, sir, he did. He came back and said that the State
25 was offering 35 years. And then I asked him again what the

1 parole eligibility would be under that, and he said, "Right at
2 six years. If you go down there and keep your nose clean,
3 you'll do six."

4 Q Now if you had known that once you got to Cummins your
5 parole eligibility date was going to be out there at around
6 nine years, would you have entered the plea?

7 A No, sir, I would not.

8 Q If Mr. Patterson had advised you that you would have to do
9 around nine years before you could possibly be paroled, would
10 you have entered the plea?

11 A No, sir, I wouldn't, and the reason was just because I at
12 the time believed that I'd have just as good a chance on a
13 life sentence of getting out before nine years.

14 Q The Joint Exhibit form -- pardon me. The Joint Exhibit
15 plea statement which I referred to earlier, which is Joint
16 Exhibit 1 --

17 MR. LASSITER: May I approach the witness, Your
18 Honor?

19 THE COURT: Yes, you may.

20 BY MR. LASSITER:

21 Q -- shows your signature on the bottom of it. Is that your
22 signature?

23 A Yes, sir, it is.

24 Q And did Mr. Patterson sign it under you?

25 A Yes, sir, he did.

1 Q Okay. And did you put these checks up here, and is that
2 -- are those your initials to the side?

3 A The initials I put on there. The checks, he asked me the
4 questions and was filling them out.

5 Q Okay. Who filled out the information in the first two
6 paragraphs?

7 A I don't know. It was already filled out when I came in
8 the room.

9 Q Okay. Did Mr. Patterson ever discuss a piece of
10 legislation called Act 93 with you?

11 A No, sir.

12 Q Did he ever discuss with you any kind of tiered system
13 based on the number of prior felony offenses which lead to --
14 which affect parole eligibility? Did he ever discuss that
15 with you?

16 A No, sir.

17 Q Did he ever tell you that your prior conviction would make
18 any difference as to your earliest potential parole
19 eligibility date?

20 A No, sir.

21 Q Do you remember when you found out that Mr. Patterson had
22 died?

23 A The first time that I heard about it was when you were
24 retained as my attorney.

25 Q And when was that approximately?

1 A In '82.

2 Q And at that time had you already filed your petition in
3 Federal Court?

4 A Yes, sir, and I was about to lose it. That was the reason
5 you were retained.

6 Q All right. Was this your first petition in Hill V.
7 Lockhart?

8 A Yes, sir.

9 Q After you got down to Cummins did you try to contact Mr.
10 Patterson --

11 A Yes, sir, I --

12 Q -- by letter?

13 A Yes, sir, I did. Actually, though, he wrote me first
14 because I had had some questions as we were departing about
15 whether or not I had told him enough time on the jail time,
16 and I got a correspondence from him when I got there but
17 before -- I think it was like within two weeks. And then I
18 found out that -- the records office sent me this time card
19 and it said that I was going to do nine years, and first I
20 checked -- I wrote the records office back and told them that
21 they'd made a mistake, and after they double-checked it and
22 everything, then they wrote and informed me that, no, they
23 hadn't made a mistake, that I was under Act 93, and as a
24 result I'd have to do right at nine years before I became
25 eligible for parole.

1 At that time, then I wrote to the Public Defender's
2 Office, and tried to get ahold of Mr. Patterson. I never
3 received any kind of answer from anyone.

4 MR. LASSITER: That's all I have on direct.

5 THE COURT: Mr. Gillean?

6 CROSS EXAMINATION

7 BY MR. GILLEAN:

8 Q Mr. Hill, you know that Mr. Patterson is not here today,
9 can't tell us his version of what it is that he told you in
10 this particular case, so all we've got is to question you
11 about what happened and what you understood at the time, so
12 I'd like to just go back, if I may, through some of this.

13 Now you've indicated that you made Mr. Patterson aware of
14 your prior conviction from Florida. And at what meeting was
15 that, that you informed him about that?

16 A Okay. The very first time that he --

17 Q The very first time.

18 A -- talked to me.

19 Q Okay. And you've also indicated that in discussing at the
20 fourth meeting the 35-year offer that the State made, he
21 indicated to you that you would be parole eligible in six
22 years or approximately six years?

23 A Yes, sir, if I came down and kept my nose clean.

24 Q Did you all specifically discuss again at that meeting the
25 prior conviction from Florida and what effect it might have on

Hill - Cross

1 your parole eligibility?

2 A No, sir, we did not specifically discuss that again. That
3 issue only came up once, and that was --

4 Q At this first meeting?

5 A Yes, sir.

6 Q You've indicated to this Court that if you knew that you
7 were going to have to serve nine years before becoming
8 eligible for parole that you would not have pled guilty?

9 A That's correct.

10 Q And you would have insisted on going to trial and taking
11 your chances with a jury trial?

12 A Yes, sir.

13 Q And why is that?

14 A Because at that time my understanding was that I had just
15 as a good a chance of getting out after seven years from a
16 life sentence as if I came down and then paroled a lesser
17 sentence.

18 Q And who told you that?

19 A That had been many of the people in the county jail, and
20 also when I spoke with Mr. Patterson, he indicated that, yes,
21 that it was not unheard of, so I couldn't see any reason
22 -- if I was going to have to serve nine years to become
23 eligible for parole, I could see no reason why I shouldn't
24 take a chance on the life sentence.

25 Q Did Mr. Patterson explain to you -- I believe you referred

1 to this earlier that if someone who received a life sentence
2 and got out within seven years, that that involved maybe
3 executive clemency?

4 A Yes, sir.

5 Q And do you understand what executive clemency is?

6 A Yes, sir.

7 Q Do you understand that there's no guarantee that anyone
8 who receives a life sentence would receive executive clemency?

9 A Yes, sir.

10 Q You also understand that with parole eligibility, it's
11 just that you become eligible for parole, let's say if you
12 have to do a third of a 35-year sentence, in approximately six
13 years but you're not guaranteed of being released on parole at
14 that time. Did you understand that at the time?

15 A Yes, sir. I understood that it meant that I would be --
16 have the chance, have the opportunity of being released on
17 parole.

18 Q And you thought that if you were going to be parole
19 eligible in nine years that that wouldn't be better off than
20 possibly having to apply for executive clemency under a life
21 sentence? I mean, you in weighing that determined that that
22 wouldn't be better, a better situation than a life sentence?

23 A No, sir, not at that time because of the fact that from
24 every indication I got, everybody seemed to believe that that
25 was not an uncommon thing. I asked just about every inmate

1 down there who I associated with, and all of them said it was
2 -- it was pretty common.

3 Q And you don't remember Mr. Patterson discussing Act 93 or
4 the statute that governed parole eligibility at all?

5 A No, sir, the first time I heard of Act 93 was from the
6 records office. I couldn't even -- and then after that I
7 tried to find it and couldn't even find it in the law books
8 any more. It took a long time.

9 Q Now I take it in that you pled guilty to this offense,
10 you're not disputing that you were guilty of the offense that
11 you were charged with; is that a fair statement?

12 A (No audible response.)

13 Q And you acknowledged to the Court that you were guilty of
14 the offenses that you were pleading guilty to, and you were
15 pleading guilty because you were guilty?

16 MR. LASSITER: Your Honor, I do not think that he
17 raises his Fifth Amendment -- or waives his Fifth Amendment
18 privilege to not answer that by these proceedings. I think
19 we're dealing with voluntariness based on advice of counsel,
20 and I think he can validly waive his -- waives his Fifth
21 Amendment privilege on that question.

22 MR. GILLEAN: My only intention is to get at the
23 guilty plea proceedings themselves. I mean, I'm certainly not
24 trying to solicit a confession from Mr. Hill. I'm only
25 getting at that he ultimately did plead guilty back in 1979.

25

1 MR. LASSITER: Well, the answer to that is obviously
2 yes.

3 THE COURT: I think Mr. Lassiter is right and the
4 objection is sustained.

5 MR. GILLEAN: I think that's all the questions I
6 have, Your Honor.

7 THE COURT: All right, Mr. Gillean.

8 REDIRECT EXAMINATION

9 BY MR. LASSITER:

10 Q William, what did you do when you found out that you were
11 sentenced under Act 93 when you got down there?

12 A I tried first writing the Public Defender's Office, and
13 didn't get any response. Then I went down and tried to find
14 Act 93 in the law books and didn't know enough about it to
15 find it.

16 Q What did they tell you at the records office when you
17 talked to them about it?

18 A That it meant I was going to have to do a half and less
19 good time.

20 Q Okay.

21 MR. LASSITER: That's all I have.

22 MR. GILLEAN: Nothing further, Your Honor.

23 THE COURT: All right. You may step down, Mr. Hill.

24 (Witness excused.)

25 MR. LASSITER: The petitioner rests, Your Honor.

1 THE COURT: All right.

2 PETITIONER RESTS

3 MR. GILLEAN: And, Your Honor, as I indicated
4 earlier, respondent has no witnesses to call.

5 THE COURT: Very well, Mr. Gillean. Do I deem the
6 matter submitted?

7 MR. LASSITER: Yes, Your Honor.

8 MR. GILLEAN: Yes, Your Honor.

9 THE COURT: Very well, I'll try to have you a
10 decision as quickly as possible. If there's nothing further
11 we stand in recess.

12 (Recess at 2:50 p.m.)

13 C E R T I F I C A T E

14 I certify that the foregoing is a correct transcript
15 from the electronic sound recording of the proceedings in the
16 above-entitled matter.

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18 *Kay Quinn* *Sept 12, 1988*
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